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U.S. Government Accountability Office’s Fiscal Year 2022 Bid Protest Report to Congress: What Does the Reduction in Protests But Increased Effectiveness Mean?

*By Marcia G. Madsen and Evan C. Williams**

In this article, the authors review the U.S. Government Accountability Office’s recently released report on bid protests for fiscal year 2022.

The U.S. Government Accountability Office (GAO) recently published its Annual Bid Protest Report to Congress for Fiscal Year (FY) 2022.¹ The report contains bid protest statistics for FY 2018–2022.

	FY2022	FY2021	FY2020	FY2019	FY2018
Cases Filed	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)	2607 (less than 1% increase)
Cases Closed	1655	2017	2137	2200	2642
Merit (Sustain + Deny) Decisions	455	581	545	587	622
Number of Sustains	59	85	84	77	92
Sustain Rate	13%	15%	15%	13%	15%
Effectiveness Rate	51%	48%	51%	44%	44%
ADR ² (cases used)	74	76	124	40	86
ADR Success Rate	92%	84%	82%	90%	77%
Hearings	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)	0.51% (5 cases)

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¹ <https://www.gao.gov/products/gao-23-900462>.

² Alternative dispute resolution is referred to here as “ADR.”

TAKEAWAYS

Total Protests Filed

The most notable statistic from GAO's report is that total protests filed at GAO in FY2022 went down 12%. And importantly, this reduction comes after the number of protests had already fallen 12% in the prior year. While the recent data reveal that GAO bid protests are on a downward trend, the causes of the drop are not apparent, and are therefore likely to be debated among members of the procurement community. Possible reasons for this decline include:

- More protesters may be choosing to pursue their challenges by filing bid protest complaints with the Court of Federal Claims (COFC) instead of GAO.³
- To the extent that agencies are increasingly exercising their other transaction authority (OTA), over which there is limited GAO bid protest jurisdiction, fewer total acquisitions may be subject to protest.⁴
- Would-be protesters could be receiving sufficient information from agencies during enhanced debriefings to discourage them from filing as many protests.⁵

Effectiveness Rate

Even though the sustain rate dropped slightly (from 15% to 13%), the overall effectiveness rate of GAO protests increased to 51%. As stated in the

³ Anecdotally, we have heard recent reports that bid protest filings at the COFC have markedly increased. To date, however, the total number of COFC protests filed during FY22 is not publicly available.

⁴ Other transaction agreements are legally binding instruments that, by statutory definition, are other than contracts, grants, or cooperative agreements, and generally are not subject to federal laws and regulations applicable to procurement contracts. Oracle Am., Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 1 n.1. GAO has concluded that such agreements issued by an agency under its "other transaction" authority "are not procurement contracts," and therefore GAO generally does not review protests of the award or solicitations for the award of these agreements under its bid protest jurisdiction. System Architecture Info. Tech., B-418721, June 2, 2020, 2020 CPD ¶ 184 at 2. The only exceptions to this general rule are situations in which an agency is exercising its OTA authority, and the protester files a timely, pre-award protest alleging that the agency is improperly exercising that authority to avoid using a procurement contract. *Id.*

⁵ On March 18, 2022, the US Department of Defense (DoD) published a final rule related to enhanced debriefing rights for unsuccessful offerors for competitive negotiated contracts in excess of \$10 million, and task orders and delivery orders in excess of \$10 million acquired under the Federal Acquisition Regulation.

report, GAO considers a protest to be “effective” if the protester obtains some form of relief from the agency, either as a result of voluntary agency corrective action or GAO issuing a decision sustaining the protest.

At first blush, this statistic would appear to be a good sign for protesters, as it seems to indicate that more than half of all challenges filed at GAO succeed. However, as experienced practitioners are well aware, voluntary corrective action may or may not ultimately result in meaningful relief to the protester. For instance, an agency could take corrective action only for generating more documentation to support the existing award decision.

An effective rate of over 50% might also reveal something about the quality of agency procurements. That is, if agencies are taking corrective action—either voluntary or at GAO’s recommendation—in response to more than half of all GAO protests, it suggests that agencies are struggling to award contracts in accordance with applicable procurement statutes and regulations. In the end, without more granular data as to how often final award decisions are changed after corrective action, it is difficult to determine the actual significance of the increased effectiveness rate.

Hearings

Another aspect of the report worth mentioning is that the number of GAO hearings dropped from an already small percentage of 1% to just 0.27% of total cases. Meaning, GAO conducted only two hearings in FY 2022. Under the Competition in Contracting Act of 1984, GAO is required to “provide for the inexpensive and expeditious resolution of protests” to “the maximum extent practicable.”⁶ To this end, GAO’s general practice is to review the existing procurement record and briefs from the parties before issuing a written decision within the statutory 100-day deadline. And unlike the bid protest practice at the Court of Federal Claims, GAO does not hold hearings as a matter of course. Indeed, a hearing appears to only be held at GAO if there is a compelling reason, such as a need to receive expert testimony or to resolve a factual dispute.

With the overall number of protests declining—potentially freeing up more time and resources for GAO attorneys—it will be interesting to see whether GAO will hold more hearings in coming years.

⁶ See 31 U.S.C. § 3554(a)(1) (creating 100-day timeframe for GAO decisions).